IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 543 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHAILAKUMARI BRIJMOHAN

Versus

STATE OF GUJARAT

Appearance:

MR PM VYAS for Appellant

MR AJ DESAI, APP for Respondent

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 03/05/2004

ORAL JUDGEMENT (Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

1. This Appeal is preferred by Shailakumari Brijmohan original accused in Sessions Case No. 96 of 1996 of the Court of Sessions Judge, Valsad, against the judgment and order dated 14th of May, 1997, delivered by Additional Sessions Judge, Valsad, Camp at Navsari, convicting the accused appellant under Section 302 of Indian Penal Code and sentencing her for the rigorous imprisonment for life and fine of Rs.200/- in default to undergo simple imprisonment for one month.

2. According to the prosecution case, the present appellant - accused is wife and deceased Brijmohan Bhyani was her husband. Both of them were staying as husband and wife at Kolivad Bordi Falia, Vapi. They were married on 22nd of May, 1994 at Mumbai. Deceased Brijmohan was working as Watchman at one factory. Thereafter the appellant - accused got job in one Garment Company at Daman and she worked there for 5 to 6 months, but during this period she became pregnant and, therefore, she left her job and came to reside at Vapi. She was staying during that period in her room provided by Garment company because her marriage with the deceased was facing rough weather and frequently quarrels were taking place between them. Since the appellant - accused was staying in a room provided by the garment company, her husband deceased was doubting her character and on that count frequently was beating appellant - accused. After leaving the job of the garment company, she came to Vapi to reside with her husband before 7/8 months of the incident. On 10.2.1996, she gave a birth of a child. The incident in question occurred on 24.4.1996. Right from April, 1996, her husband deceased was not going on his job and was staying at home for the whole day. On the day of the incident i.e. 24.4.1996, he went out of the house and came back at about 5.30 p.m. Again he went out and since he was in the habit of taking liquor, came back at about 8.00 p.m. under the influence of liquor. On that day, the appellant - accused had not prepared any meals and therefore they slept. On the same day, in the morning at about 10.30 a.m. appellant - accused had been to Vapi for purchasing threads for clothing and returned at about 11.30. Picking up this incident, her husband in the influence of the liquor, started quarrel with her and started beating her doubting her character. The quarrel lasted upto 11.30 and thereafter both of them slept in their house which was a rented premises of one room. At about 2.00 a.m. on 254.1996 deceased awakened, started abusing appellant accused in the middle of the night and started beating her with fist, etc. This provocated appellant - accused and she with her "dupatta" strangulated her husband, due to which deceased died.

Till morning, the appellant accused did not come out from her room and at about 11.15 on 25.4.1996 she surrendered before the Vapi Town Police Station and gave complaint. The crime was registered against appellant - accused in pursuance of FIR given by her before Vapi Town Police Station. Investigation thereafter entrusted to PW-5 Hitendrakuamr Natvarlal Rao who submitted charge sheet against present appellant accused in the Court of Judicial Magistrate, First Class at Pardi and in turn the case was committed to the Court of Sessions at Valsad.

3. Additional Sessions Judge, Valsad, Camp at Navsari, framed charge against the appellant - accused on 29.3.1997 for the offence punishable under Section 302 of the Indian Penal Code. She pleaded not guilty to the charge and hence the prosecution examined as many as 5 witnesses and produced on record documentary evidence.

4. After recording of the evidence, learned Trial Judge recorded the statement of the accused under Section 313 of the Criminal Procedure Code wherein except the complaint at Exh. 16 which she admitted to have given, she denied all the allegations made in the evidence. After hearing thereafter both the sides, the learned Trial Judge came to the above mentioned conclusion and hence this Appeal.

5. Before going through the submissions made, it is necessary to peruse the evidence recorded in the case carefully. The prosecution examined PW-1 Dr. Pradipkumar Ramdatt Pure, who was at relevant time, Medical Officer of the Primary Health Centre, Vapi and according to him at about 2.00 p.m. on 25th of April, 1996, he received dead body of Brijmohan for postmortem. He started postmortem at 2.30 p.m. and completed at 3.45 p.m. According to him, there were following external injuries on the body of the deceased.

"Ligature Marks on the neck at thyroid. Level Lt.to Rt 4" x 2" dark brown hard oblique in direction. Cunea nail Marks on the neck. Thumb on Rt. side 2cms x 1/2 cm. Fingers on left side only 2 impressions markable. Abrasion on both shoulders about 3" x 1 1/2" Rt.Lt. Abrasion on back of abdomen near 4th, 5th limber region 3" x 1" side. Skin detachment on both toes. Hyoid bone # red palpable."

There were internal injuries corresponding to the external injuries. According to the opinion of the

Doctor, the injuries were antemortem and death was due to asphyxia resulting from strangulation with Dupatta and hand force. He has been cross examined in detail, but nothing is coming out to establish that the death of the deceased Brijmohan was not a culpable homicide and by strangulation. Postmortem Note is produced at Exh.12.

6. PW-2 Exh.13 Khandubhai Kalidas who happened to be neighbour of this couple and stated before the trial court that he knew the couple which was staying in the adjoining room. He deposed that the deceased died in his room in which both husband and wife were staying together. Except that he did not support the prosecution version and, therefore, he was cross-examined by the learned APP and was confronted with the Police statement, in which he has stated that the deceased was doubting the character of the appellant - accused. There were frequent quarrels between them on the night of the incident. There was a quarrel on the night of the incident and which he heard the noises. But he has denied to have stated this in the police statement.

7. PW-3 Exh. 14 Vinuben Jivanbhai is examined for the purpose that this witness happened to be neighbour of appellant - accused and deceased and she stated before the Police that there was age difference between husband and wife, wife was much younger than husband - deceased. Frequent quarrels were taking place between them because Brijmohan had a doubt about the character and chastity of the wife. Deceased was in habit of taking liquor and was beating the appellant accused. While in her deposition before the court she stated that she knew the couple who were staying in the neighbouring room of elder brother of her husband. She denied having the knowledge about the death of Brijmohan.

8. PW-4 Rameshbhai Somabhai Patel is examined at Exh. 15 and according to him on 25th of April, 1996 he was on his duty at Vapi Town Police Station being PSI and about 11.15 a.m. the appellant - accused came to the Police Station, she gave her complaint before him in respect of the death of her husband. According to PW-4 appellant - accused gave complaint that due to quarrel between husband and wife and since the deceased was doubting her character, appellant - accused with her "dupatta" strangulated her husband. According to PW-4 in the said statement, complainant - appellant - accused signed in his presence which he produced at Exh. 16. He has been cross-examined and it was alleged that the appellant - accused did not know Gujarati language but the witness replied that she was speaking in both the

languages.

9. PW-5 Exh. 17 Hitendrakumar Natvarlal Rao is examined as Investigating Officer of the case. On 24.4.1996 he was serving at Vapi Town Police Station as second PSI, he investigated the crime registered against the appellant - accused, drawn inquest panchnama, scene of offence panchnama, seized dupatta, seized clothes from the dead body, etc and submitted charge sheet in the court. Nothing is asked in the cross-examination by the defence except whether this witness had recorded the statement of one Piraka Nepali.

10. Learned counsel Mr. P.M.Vyas appointed for the appellant - accused vehemently urged before this Court that the offence is not committed by the appellant accused and that the case is not proved beyond doubt by the prosecution. It is urged that none of the witnesses has supported the prosecution case as to complete the chain of the circumstantial evidence and, therefore, the appellant - accused is required to be acquitted and appeal be allowed. It was further contended that in any case if it is held that the accused has committed the crime, then the accused - appellant is guilty for the lesser offence under Section 304 of the Indian Penal Code and not under Section 302 as held by the learned Trail Judge. As against that, learned APP Mr. A.J. Desai contended that by all circumstantial evidence it is established that it is appellant - accused and appellant - accused only committed the crime and strangulated her husband with dupatta. It was argued that she herself gave the complaint before the Police and according to that complaint she has committed the crime.

11. Learned Trial Judge took the circumstances of the case into consideration and the complaint at Exh. 16 filed by the appellant - accused and came to the conclusion that the appellant - accused was guilty of committing murder of her husband. Taking into consideration the evidence recorded by the Trial Judge and the contentions raised, it appears that this is a case of circumstantial evidence against the appellant accused. We make it clear that in para 14 of his judgment, the learned Trial Judge has attempted to rely upon the complaint given by appellant - accused but in our view that is not permissible in law because the complaint given by the appellant - accused is nothing but the confession before the police authority which cannot be used against the accused nor in favour of the prosecution, but we do agree to the extent that having regard to the panchnama of scene of offence which is

admitted by the defence and from the evidence of PW-2 Khandubhai Kalidas and PW-3 Vinuben Jivanbhai though they are hostile witnesses it is established that in her rented room accused - appellant and the husband resided together at the time of incident. From the evidence of PW-2 Khandubhai Kalidas it is also clear that there were quarrels between the couple about the character and chastity of the wife i.e. accused - appellant which was seriously doubted by husband - deceased. Very important circumstance which is disclosed and established by the prosecution is, in the said room where only husband and wife were staying at night, the husband was found dead by strangulation, and except a child about four months, nobody else had access to the said room. It was the duty of the appellant accused to explain this circumstance in her further statement under Section 313 of the Code of Criminal Procedure but instead she adopted the defense of total denial and this total denial on the part of the appellant accused completes the chain and link missing is found from the non-explanation of accused - appellant of the above circumstances. From the evidence of PW-2 and PW-3 it is established that on the night of the incident when both appellant accused were alone in the room, when it is established by the medical evidence that the death of the deceased was culpable homicide by strangulation with dupatta and hand force, when panchnama of scene of offence is admitted by the defence, then it becomes the duty of the appellant accused to explain before the court these circumstances which she failed to do and, therefore, the missing link of the chain leading to culpability of the accused - appellant is found from the further statement of the appellant accused. True it is that the First Information Report given by accused appellant cannot be looked into as an evidence but under Section 8 of the Evidence Act the conduct of the accused appellant is relevant to come to a conclusion that in fact appellant - accused filed FIR before the Police. PW-4 Rameshbahi Somabhai Patel who recorded the complaint Exh. 16 can be relied upon to the extent to prove the fact that the accused - appellant at 11.15 a.m. went to the Police Station and gave First Information Report. Nonetheless, the contents of the First Information Report cannot be used as an evidence in the matter. To that extent, we are in agreement with the learned Trial Judge that from whatever evidence available against the appellant accused and from whatever evidence adduced by the prosecution, it is undoubtedly proved that the deceased was killed by appellant - accused by strangulating him through her dupatta and hand force.

12. When the First Information Report Exh. 16 cannot

be seen as an evidence of the prosecution, then the question arises about how to ascertain the genesis of the occurrence in question. This is important because the circumstantial evidence, that since husband and wife were alone in the rented room and when husband is found dead due to strangulation by dupatta raises very strong inference of guilt adverse to the appellant accused. Non-explanation of appellant accused about this evidence provides strong link to the circumstances so as to link her with the crime. Still it is necessary for the courts of law assessing the evidence and coming to a conclusion of a criminal trials to ascertain what was the genesis of the incident and in what circumstances the incident occurred. This is again important because unless particulars of the incident if do not come on the record, it becomes very difficult to come to the conclusion that what sort of offence is committed by the accused. In such circumstances, the Apex Court has given guidelines in a matter of SHRI MURLI alias DENNY vs. STATE OF RAJASTHAN as reported in AIR 1994 SC 610. The Apex Court in the above said judgment observed in paras 4 and 5 as under :

"4. Learned counsel who appeared for the appellant before the courts below contended that FIR which is in the nature of confession could not be proved against the accused as the same was hit by S. 25 of the Evidence Act. Learned counsel, however, wanted to rely on a part of the statement in the FIR wherein the accused has stated that the deceased came near his shop and hurled the abuses virulently and having been provoked in a sudden manner, he inflicted injuries. The courts below was not prepared to give the benefit of the exception No.1 to S. 300, since the statement as a whole should be eschewed from the consideration.

5. Having examined the circumstances on record, we are satisfied that it was the accused who inflicted injuries on the deceased person, as a result of which he died. But the learned senior counsel Shri Sibal submits that there are any number of circumstances indicating that the accused acted on a grave and sudden provocation and, therefore, exception No.1 to S. 300 is attracted. We find considerable force in this submission. To start with, the prosecution evidence itself indicates that the deceased was a man of violent nature and had no regard for law and was creating terror and fear in the minds of

common people. In such an aggressive mood, he must have gone to the shop of the accused. As to what exactly preceded the attack is not borne out by the evidence. However, there is a clear indication in the first statement given by the accused himself which formed the FIR in this case to the effect that the deceased in an aggressive manner went to the shop of the accused and showered virulent abuses. It may be mentioned here that we are not using the statement of the accused before the SHO for any purpose in favour of prosecution as against the accused. The only admission which we find in the statement in favour of the accused is being taken into account to examine whether the case falls under exception No.1 to S. 300 IPC, particularly in view of the fact that there is no evidence disclosing as to how the quarrel ensued and attack took place. Having carefully considered the entire material, we are of the view that Exception No.1 to S. 300 is attracted in this case. The Exception lays down:-

"Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who have the provocation or causes the death of any other person by mistake or accident."

This Exception is no doubt subject to certain limitations. In the instant case, the provocation is not sought or provoked by the accused. The medical evidence also shows that most of the injuries were found on the hips and the possibility of having received injuries by the deceased during grappling cannot be ruled out. In such cases, it cannot be said that the accused caused the injuries by way of an excuse for killing the deceased. Accordingly, we set aside the conviction of the appellant under Sec. 302 Indian Penal Code and imprisonment for life awarded thereunder and, instead, we convict him under Sec. 304 Part-I Indian Penal Code and sentence him to undergo rigorous imprisonment for 10 years."

13. Now, accordingly, in this case, though the First Information Report filed by the accused - appellant cannot be used in favour of the prosecution or against the accused - appellant and only admission in favour of

the accused is taken into consideration to examine whether the case falls under Exception -I to Section 300 IPC in view of the fact that there is no other evidence on record disclosing as to how quarrel started and ended with the death of the deceased, we clearly find that the facts of the present case are squarely covered by Exception-I of Section 300 IPC. It is amply clear that the deceased was older in age than his wife. The deceased was doubting chastity and the character of the appellant - accused and due to which for some period she remained alone in her room which was provided by one garment company in which she was doing job. The deceased was in the habit of taking liquor and on the day of incident at about 8.30 p.m. the deceased came to the house loaded with liquor and started quarreling. The matter does not rest here. During night at 2.00 a.m. the deceased had awakened and started beating appellant accused. There also the cause of dispute in the middle of the night was the character and chastity of wife i.e. appellant - accused and in these circumstances the accused - appellant deprived of the power of self control by grave and sudden provocation given by the deceased, who awakened at 2.30 a.m. at night and started beating, the appellant accused, she strangulated the deceased by her dupatta. Therefore, the case now having regard to the genesis of the incident is clearly covered by Exception -1 of Section 300. The restrictions placed on Exception-1 of Section 300 is also not applicable in the present case. We can easily imagine the plight of a wife, who has been doubted by her husband about her chastity, and in the middle of night when such wife receives beating at the hands of her husband. Therefore, we are not in agreement with the learned Trail Judge in this respect that the appellant accused is guilty of culpable homicide amounting to murder, but the appellant accused is guilty only to the extent of culpable homicide not amounting to murder and punishable by Section 304 Part-I of the Indian Penal Code. Accordingly, we set aside the conviction awarded by the learned Trail Judge to the appellant - accused under Section 302 of the Indian Penal Code and instead we find the appellant - accused guilty of the offence punishable under Section 304 Part-I of the Indian Penal Code as above discussed.

14. Now the question is what sentence should be awarded to the appellant - accused under Section 304 Part-I of the IPC when she is not found guilty under Section 302 of the Indian Penal Code. Learned APP Mr. A.J.Desai has produced on record jail remarks of the appellant - accused. Accordingly, she was in jail during trial for about one year and 19 days. After conviction

on 14.5.1997 she remained in jail for about 2 years 10 months and 14 days. She was released on bail pending Appeal from 12.4.2000 vide order of the Division Bench of this Court which was passed on 13.12.1999 in Criminal Misc. Application No.7394 of 1999. She has also earned State remission of about two years. Taking into account the remission which earned by her, she is considered to have undergone almost five years 11 months imprisonment which is nearly about 6 years. Taking into consideration the circumstances in which the incident has taken place, young age of the appellant - accused and above all small child of the appellant - accused to whom now she is required to maintain, we find this to be a fit case in which the imprisonment which appellant accused has undergone would be sufficient to meet the ends of justice. Therefore after setting aside the imprisonment of life as awarded by the learned Trial Judge, we award the sentence of imprisonment to the appellant - accused which she has already undergone for the offence punishable under Section 304 Part-I of the Indian Penal Code as discussed above. In this view of the matter the following order is passed.

" The Appeal of the appellant is partly allowed to the extent that conviction of the appellant under Section 302 of the IPC and sentence of rigorous imprisonment for life and fine of Rs.200 in default SI for one month as awarded by the Trail Judge vide impugned judgment and order is set aside, instead the appellant - accused is convicted for lesser offence under Section 304 Part-I of the IPC and sentenced to the imprisonment which she has already undergone. Fine if paid be refunded to the appellant. Appellant accused is on bail from 12.4.2000 vide order dated 13.12.1999 of the Division Bench of this Court in Criminal Misc. Application No. 7394 of 1999 and hence the bail bond of he appellant - accused stands cancelled."

(B.J.Shethna, J.)

(J.R. Vora, J.)

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